IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. H. STANTON, *Plaintiff in Error,* vs. J. L. HAMILTON, *Defendant in Error.*	No. 3538

Error to the United States District Court for the Eastern District of Washington

BRIEF FOR DEFENDANT IN ERROR

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EMPIRE-PACIFIC PRINTING CO., SPOKANE

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STATEMENT OF THE CASE.

(Note. The case of Hample vs. Stanton and Hamilton vs. Stanton were tried together, although not formally consolidated. There was, therefore, but one record in the case. Separate writs of error were sued out and separate bills of exception have been sent to this Court and the cases are assigned for argument at the same time. The only difference in the printed record is a slight discrepancy in the pages upon which certain portions of the evidence appear, and the only difference in the briefs is that in the Hamilton case there is a question of attempted rescission. The time alloted us for preparing our briefs in the two cases being very short, so that there was question whether the printer could get out two briefs in time, we have prepared a brief which is the same in both cases, entitling one set in each of the cases. The bracketed figures indicate page references to the printed record, and the printed record referred to in all cases is that in No. 3537, Stanton, Plaintiff in Error, vs. Hample, Defendant in Error.)

The material part of the statement of the case made by Stanton's counsel is based upon testimony which the jury had a right to believe and which, if believed, would have necessitated a verdict in Stanton's favor. Unfortunately for Stanton, however, the jury did not believe this testimony and so a verdict against him resulted. Inasmuch as this Court will not sit in review of the jury's findings, it is evident that a statement based upon testimony which was rejected by the jury is utterly valueless for the purpose of informing this Court so it may act

intelligently upon the questions which are open for its consideration. We therefore make a statement of the case which is based upon testimony that the jury accepted and acted upon in returning its verdict in favor of Hample and Hamilton.

Stanton was the president and general manager, the principal shareholder, and the virtual dictator of the E. H. Stanton Company. He and his son were two of its board of four directors, Hample and Hamilton being the other two. Hample and Hamilton resided in Butte and only came to Spokane, where the Stanton plant was located, once or twice a year. For their information concerning the Company's affairs, they depended upon statements and reports from time to time made to them by Stanton (49-50, 102). Prior to May, 1917, Stanton had become very desirious of disposing of his business, principally, it would seem from his statement to Armour & Co. during the negotiations for the sale to that institution, because he had worked hard, desired to take a rest, and had no one to take his place in the management of the Company because his son was not inclined to go on with the business (79). Early in 1917, Stanton gave Wilson & Co. an option on his stock for $200 a share, which option was not exercised (100). On May 8, 1917, he gave an option to a broker, one Grinnell, on 5084¼ shares of the stock at $220 a share, the purpose of such option being to enable Grinnell to try to make a sale of the stock to Armour & Co. (100, 39). That amount of stock represented practically all the issued

stock of the Stanton Company and was more than was owned by Stanton, Hample and Hamilton, the principal shareholders, combined. Grinnell went to Armour & Co. with this option and as a result Armour & Co. sent representatives to Spokane to examine the property. After they had been in Spokane a few days, Stanton went over to Butte to see Hample and Hamilton about selling their stock, this being the first intimation they had that a sale was desired or in contemplation. Stanton told them that the prospective purchaser was Armour & Co., represented that the Stanton Company had a large amount of stock on hand and a poor market for it, that the Government had required the Stanton Company to put in improvements which would cost $150,000 to $200,000 and that if they didn't sell their stock to Armour & Co. that company would put in a competing plant in Spokane and ruin their business. His conclusion was that they ought, by all means, to sell the stock and that he would take $150 a share for his stock if he could not do any better (42, 52-53, 101). Hample and Hamilton thought the price mentioned was too low and said they would not sell without going to Spokane and looking the plant over. Stanton had told them in Butte that he had said to Armour & Co. that he would not sell his own stock unless it took care of Hample and Hamilton, and when they reached Spokane he took them out to the plant, showed them around, and then took them to his house as his guests. He said that Armour & Co. had not made a proposition, that

it only wanted to buy a certain amount of stock, but that he would not sell his stock unless Hample and Hamilton sold theirs. He said he would drive as hard a bargain with Armour & Co. as he could and that whatever he got for his stock Hample and Hamilton would get for theirs. He told them that all their stock ought to be sold together and that he wanted to do the trading and would make the hardest trade he could, repeating that whatever he got for his stock they would get for theirs and that he didn't want to make a cent off of them (43, 53-55).

After looking the plant over, Hample and Hamilton were confirmed in their opinion that the price talked by Stanton in Butte, $150 a share, was too low, and said they would not consider a sale at that price. Stanton then suggested that they might be able to get as much as $175, and said that if he could get $175 for his stock he was ready to sell it. Hample thereupon offered to take his (Stanton's) stock at that figure and pay cash for it, upon which Stanton laughed and said that he might possibly do a little better (43-44). Hample and Hamilton remained in Spokane for several days. They were faithful to their agreement with Stanton to let him do the trading and so did not talk about the deal with the Armour representatives. Stanton continued to talk discouragingly of the value of the property, but represented that he was crowding Armour & Co. up and had got its representatives where he thought they would pay $190. About this time Hamilton said that he would not con-

sider less than $200 a share for his stock and that if Armour & Co. did not want to close on that basis he was going home. Hamilton at that time had gone to the hotel, and he paid his bill, got his grip, and started for home. Stanton, discovering this, was immediately successful in getting the price Armour & Co. was willing to pay raised to $200, and thereupon took Hamilton and Hample to Robbins, vice president and principal representative on the ground of Armour & Co., and told him that they were willing to sell for $200, upon which the deal was immediately closed. They were told not to say anything about having made a sale and left, not knowing until some time after what Stanton was paid for his stock (44-46, 53-56).

The contract by which Stanton sold his stock to Armour & Co. stated a lump price of $576,400 for the 2420⅔ shares of stock owned by him. Figuring Stanton's 2420⅔ shares of stock at $220 a share, the amount is $532,546.66. Twenty dollars a share on Hamilton's 1096⅓ shares amounts to $21,926.67. Hample owned an equal amount of stock. Add the three sums together: $220 a share on Stanton's stock is $532,446.66, plus $21,926.67, represented by $20 a share on Hample's stock, plus $21,926.67, represented by $20 a share on Hamilton's stock, and the result is the lump sum agreed to be paid for the Stanton stock, $576,400. The conclusion is irresistible that Stanton sold his own stock at the price stated in the option, $220 a share, and then procured to be added to it $20 a share on the Hamilton and Hample stock. That

Armour & Co. was entirely willing to pay Stanton $220 a share for all the stock of the Stanton Company he could obtain, no matter what he paid for it, is evidenced by the provision in the sale agreement that Armour & Company would purchase from Stanton any of the stock of the Stanton Company he might be able to obtain, regardless of the purchase price he might pay for it, the offer to remain open for a period of four months (36-38).

There were some collateral agreements inserted in the Stanton sale contract, such as that he would not engage in the meat business in four designated states for a period of ten years, and would guaranty the accounts receivable, etc., and it is contended that the sale price stated in his contract, so far as it exceeded $200 a share for his stock, was paid him for these collateral agreements. The evidence is overwhelming that the pretense that the sum over $200 a share that was paid him for his stock was paid for these incidental agreements is the veriest sham. In any event, it was obviously a question for the jury upon the direct testimony and the inferences reasonably to be drawn from all the evidence as to the true nature of the transaction between Stanton and Armour & Co. The jury found that Stanton not only got $220 a share for his own stock, but he got $20 a share on the Hample and Hamilton stock, for the receipt of which there was no other consideration except that he was successful in getting their stock for Armour & Co.

at $200 a share. The verdict was for this $20 a share on their stock, and it is of this that Stanton complains.

ARGUMENT.

After the jury returned verdicts against Stanton, he became dissatisfied with the attorneys who tried the case for him below and substituted his present counsel for them (159-160). As the argument proceeds it will be observed that there are two vital defects in the positions taken by Stanton's present counsel. The first is that there is nothing to them, as matter of law, and the second is that Stanton's trial counsel did not believe there was anything in any of these positions and therefore did not take them during the trial, so that neither by objection nor exception was any question made in the lower court which is now attempted to be urged in this court.

I.

The principal complaint which is made of the instruction assailed by the first specification of error is that there was no evidence upon which to base it, and that therefore it was necessarily misleading.

An analysis of the issues made by the pleadings shows that the instruction in question was the pivotal one given. Plaintiff's complaint stated a clear-cut cause of action for money had and received. It charged that the defendant procured the plaintiff to permit him (defendant) to make the sale of the plaintiff's stock to Armour & Co. by representing that

plaintiff should receive the same amount for his stock that Stanton received for his; that Stanton made a sale of the stock, plaintiff's as well as his own, to Armour & Co. for $220 a share; that he falsely represented to the plaintiff that the stock had been sold for $200 a share; that plaintiff, in reliance upon such statement and in ignorance of the fact, thereupon sold his stock for $200 a share; that the defendant was paid $220 a share for his own stock and $20 a share upon the number of shares owned by plaintiff, he receiving this latter amount because he had been able to get plaintiff's stock for $200 a share (2-6).

The defendant, both by admissions and denials and affirmative plea, averred the fact to be that he was paid but $200 a share for his stock, and that the additional money paid him was as consideration for the collateral agreements made by him in selling his stock (10-12).

The instruction attacked was to the effect that if the jury found from a preponderance of the testimony that the defendant assumed and agreed to and actually did conduct the negotiations which resulted in the sale of plaintiff's stock to Armour & Co., that the plaintiff had no information concerning the price which Armour & Co. was willing to pay, or which the defendant got for his stock, except such as the defendant gave him, that by reason of defendant's misstatement or concealment the plaintiff was induced to accept $200 a share for his stock, whereupon $20 a share on the number of shares owned by him was

added to the price paid to the defendant for his stock, and that this $20 a share was added to the price paid defendant because Armour & Co. had been able to procure plaintiff's stock for $200 a share, then the amount of money thus received by the defendant, to-wit; $20 a share on the number of shares owned by plaintiff, rightfully belonged to plaintiff, and the jury's verdict should be for him in that amount (128-129).

It is now insisted by Stanton's counsel that the evidence clearly establishes that Stanton was paid but $200 a share for his stock, and that the additional purchase price stated in his contract of sale was paid him in consideration of his collateral agreements that he would not engage in business in four designated states, that he would guaranty the accounts, etc. Supported by wholesale quotations from the testimony, it is argued over thirty or forty pages of the brief that there is neither direct evidence nor any reasonable inference from evidence to sustain the claim that Stanton got more than $200 a share for his stock or received any money on account of the sale of plaintiff's stock, but that it indisputably appears that the transaction was a straightforward, clear-cut sale of Stanton's stock for $200, and that there was added to it the sum of $92,266.67, which was paid him as consideration for his collateral undertakings.

If counsel's claim is sustainable, it is apparent that there was no evidence to go to the jury in support of the plaintiff's case and a verdict in the defendant's favor should have been directed. If it is true that the

evidence establishes without dispute that Stanton received but $200 a share for his stock, the same price that was paid Hample and Hamilton, that he received no part of the purchase price of the Hample and Hamilton stock, and that the additional consideration which was paid him in excess of $200 a share for his stock was *bona fide* paid him as consideration for the collateral undertakings he entered into in selling his stock, then plainly no case of any sort was made against Stanton. Looking to the record, however, it is seen that Stanton's trial counsel took the view that there was evidence to take the case against him to the jury. Neither by motion for non-suit, nor for a directed verdict, nor for a new trial, did they challenge the sufficiency of the evidence. Moreover, they requested an instruction in which the theory of plaintiff's case as outlined in the complaint was stated, and which told the jury that in order for the plaintiff to recover on that theory he must establish by a preponderance of the evidence (a) that the plaintiff authorized the defendant to sell plaintiff's stock and the defendant agreed to sell plaintiff's stock at the same price he sold his own, (b) that defendant did in fact sell plaintiff's stock, (c) that the price Armour & Co. promised to pay for plaintiff's stock was $220 and not $200 per share, (d) that Armour & Co. actually paid for plaintiff's stock $220 per share, of which $20 was paid to defendant, and that if plaintiff had failed to establish by a preponderance of the evidence any of those things, then he could not recover

(120-121). They also requested an instruction in which Stanton's theory of the case was stated, *viz.,* that he had sold his stock for but $200 a share, and that the remaining consideration paid him was in consideration of his collateral undertakings, and that if the jury should find that a part of the consideration named in the contract of sale was paid, or agreed to be paid, to Stanton for his collateral undertakings, and that in fact Stanton sold his own stock for the same price at which plaintiff's stock was sold, then it should find a verdict in the defendant's favor (122-123). These instructions were given either *ipsissimis verbis* or in substance (130-133).

Now it is well settled that though there may be "ground for serious doubt" respecting the sufficiency of the evidence to take a case to the jury, if a directed verdict is not demanded and the defendant assumes that the case will be submitted and asks instructions touching the several points on which it relies, there can be no reversal because the issues of fact were submitted to the jury. *Hartford etc. Ins. Co.* v. *Unsell,* 144 U. S., 439, 451. In the absence of a request for a directed verdict, the appellate court will assume "that there was sufficient evidence to warrant the court in permitting the jury to draw the inferences proper to be deduced from the evidence in the case." *Hansen* v. *Boyd,* 161 U. S., 397, 402. The objection that there was no evidence of the amount of damage caused by breaches of a contract cannot be made for the first time in the appellate court. It is essential to its con-

sideration that the attention of the trial court should have been called to the point and the direction of a verdict requested on that ground. *Mercantile Trust Co.* v. *Hensey,* 205 U. S., 298, 306. A party who has requested an instruction which assumes that there is some evidence as to a certain matter cannot allege error in the giving of another instruction relating to the same matter on the ground that there was no evidence in relation thereto. *Little Rock etc. Co.* v. *Mosley,* 56 Fed., 1009. This Court has held in a criminal case that where the defendant does not move for an instructed verdict, and without objection permits the jury to be charged on the assumption that there is sufficient evidence to justify a submission of the case, the point of insufficiency of the evidence is waived and cannot be considered in the appellate court. *MacDonnell* v. *United States,* 133 Fed., 293. It has also held that a defendant's motion for non-suit is waived by subsequent introduction of evidence and submission of the case without request for a directed verdict. *Alaska etc. Co.* v. *Egan,* 202 Fed., 867. See also *Mining Co.* v. *Hodge,* 213 Fed., 605. The rule stated in the foregoing cases is the universally accepted rule in all the federal courts. *Western etc. Co.* v. *Ingrahn,* 70 Fed., 219, *German Ins. Co.* v. *Frederick,* 58 Fed., 144, *Tabor v. Bank,* 62 Fed., 383, *Atlantic etc. Co.* v. *Thompson,* 211 Fed., 889, *Bidwell* v. *Trading Co.,* 183 Fed., 93, *Chisholm* v. *Brick Co.,* 65 Fed., 1, *Pennsylvania Casualty Co.* v. *Whitney,* 210 Fed., 782.

Counsel may contend that the foregoing citations

are not pertinent because they do not under this head —although they do later—contend there was no evidence to take the case to the jury; they simply insist that the instruction should not have been given because there was no evidence to warrant it. True, such is the form of the attack, but it necessarily goes to the root of the plaintiff's case. The lower court, say they, should not by this instruction have submitted to the jury the question whether Stanton got more than $200 a share for his stock, for there is no evidence that he got more; there should not thereby have been submitted the question whether Stanton got $20 a share on plaintiff's stock, for there is no evidence that he got it. On the contrary, it is vehemently argued, the evidence is undisputed that the transaction was as testified to by Stanton; that he was paid $200 a share for his stock and $92,266.67 for his collateral undertakings.

It is manifest that if such is the state of the evidence the plaintiff has no case. If so it was incumbent upon the defendant to challenge the sufficiency of the evidence below. What he failed to do there he cannot do here, directly or indirectly. In *Hansen v. Boyd,* 161 U. S., 396, which was an action involving alleged wagering deals in grain, certain instructions involving the hypothesis that the transactions were valid were objected to on the ground "that under the evidence in the case the court was not warranted in assuming or the jury in finding * * * that the transactions might be valid." As this objection went to

the root of the plaintiffs' case, and necessarily involved the claim that there was no evidence to sustain it, it was held that the objection could not be considered when the defendant had failed to ask a directed verdict. Much the same condition appears in *Mercantile Trust Co. v. Hensey,* 205 U. S., 298.

Moreover, consistency is required of a litigant, and he is held in the appellate court to the theory upon which he proceeded in the lower court. 3 Corpus Juris, 718. If a fact is admitted, conceded, or assumed without objection in the lower court, it cannot be contested in the appellate court or it be objected that there was no evidence on the question. 3 Corpus Juris, 735 *Texas & Pac. Ry. v. Oil Co.,* 204 U. S., 426. Here Stanton's trial counsel assumed there was evidence to go to the jury to sustain plaintiff's case, for they in no way challenged the sufficiency of the evidence. Furthermore, they requested an instruction which embodied the hypotheses which counsel now say there was no evidence to sustain, and informed the jury that it must find those hypotheses to be established by a preponderance of the evidence else it could not find for plaintiff (120-121), following it up by a request which embodied Stanton's theory of the transaction and advised the jury that if it found that theory to be sustained by the evidence then it must find for the defendant (122-123). Both instructions were given substantially as requested (130-133). Where a defendant not only does not challenge the sufficiency of evidence to take a question of fact

to the jury, but assumes that there is conflicting evidence upon which the evidence is for the jury's consideration, evidenced by requesting instructions presenting its contentions in that behalf, it will not be heard in the appellate court to say there was no evidence on the point. *Hartford etc. Ins. Co. v. Unsell,* 144 U. S., 439, 451, *Little Rock Ry. v. Mosely,* 56 Fed., 1009.

But plainly there was evidence for the jury's consideration on the questions of fact involved. Hample and Hamilton both testified that Stanton urged them to leave to him the negotiations for selling all their stock to Armour & Co., saying that he would drive as hard a bargain with Armour & Co. as he could, would not sell his stock unless he also sold theirs, and that they should receive the same price for their stock that he received for his. They testified that, relying upon this urging and promise, they did leave the matter of negotiations entirely to Stanton, standing firmly on the one point only, that they would not sell for less than $200 (43-45, 53-55). Stanton denies this, but manifestly that question was for the jury. It is equally manifest that the question whether Stanton was paid $220 a share for his stock, plus $20 a share on the Hample and Hamilton stock because he had gotten it for $200, or whether Stanton was paid $200 for his stock, plus $92,266.67 for his collateral agreements, was also for the jury. It certainly seems a remarkable coincidence that a lump price of $576,400 —not $575,000, or $576,000 or $577,000—was fixed

for an odd lot of 2420⅔ shares. As before remarked, taking Stanton's 2420⅔ shares at $220, we have $532,546.66. Adding $21,926.67 for Hample's 1096⅓ shares at $20 a share, and the same sum for Hamilton's 1096⅓ shares at $20 we have the total net sum of $576,400 which was paid for the Stanton stock. Recognizing the impossibility, evidently, of contending that the coincidence of these figures was a mere coincidence, Stanton proffered this explanation: He said that he had agreed to sell his stock for $200 a share, the same price that was to be paid Hample and Hamilton. Then Armour & Co. desired certain collateral undertakings from him; that he would agree not to go into the meat business in four designated states during a period of ten years, to guaranty some accounts receivable, and to give his advice and assistance to Armour & Co. for a short time. Stanton forthwith demanded $100,000 as consideration for entering into these undertakings. Armour's representatives told him, in substance, that they had come to Spokane expecting to buy the stock for $220 a share and that they didn't want to pay any more than that; that they had got his stock and Hample and Hamilton's stock for $200 a share, and they were therefore willing to pay him for these collateral agreements $20 a share on the number of shares owned by him, Hample and Hamilton, as this would simply bring the price paid for this stock up to $220, the option price. This amounted to only $92,266.67, and Stanton stood firm for his stated price of $100,000. Then the Armour people

agreed to give him, in addition, a Packard automobile owned by the Stanton Company, and an agreement that they would take off his hands at $220 a share all the remaining Stanton Company stock he could get without regard to the price he might pay for it, and this offer he accepted.

Ingenuity may be conceded to the explanation, but no reasonable person would believe it. Stanton was not only the largest shareholder in the Stanton Company but was its president and general manager, virtual dictator of its affairs. He made a price upon practically all the outstanding stock of the Stanton Company at $220 a share and the Armour representatives had come out from Chicago to examine the plant at that price. True, he says that after they had examined it, they said they would not take it at $220 a share, but the fact that they did pay that and more for the stock proves that he prevaricated in that as he did in so many other things during the progress of the trial. Now, Armour & Co. could not get the stock of the Stanton Company unless they dealt with Stanton. He owned, if not the controlling interest, at least sufficiently near it so that he, standing alone, could block their efforts to obtain control of the property. If he spoke enthusiastically of the value of the property and urged the shareholders not to sell unless at some very high price, it is clear that he could have blocked the sale. Now what do we find him doing? After the representatives of Armour & Co. had been in Spokane a few days he went to Butte to see Hample

and Hamilton, next to him the largest shareholders in the Stanton Company, and whose shares, together with his own, would have given Armour & Co. 4613⅓ shares out of a total of 5669⅔ shares issued. Self-confessedly, he went to Butte to endeavor to get Hample and Hamilton to sell their stock. Self-confessedly, he strongly urged them to make the sale, saying that the Government had ordered improvements which would cost $150,000 to $200,000, that the business generally was not in a very good way and that if Armour & Co. did not get the stock of the Stanton Company it would start an independent plant which would seriously injure the Stanton Company. Self-confessedly, he talked to them a sale at $150 a share if more could not be obtained, saying that he would take that for his stock rather than not sell. When Hample and Hamilton refused to sell their stock at $150 a share they came to Spokane to look over the situation personally. He met them when they came with the plea that he should be permitted to manage the negotiations for the sale, promising to make the best deal he could and that they should receive for their stock whatever price he got for his. He then went through the farce of pretended negotiations, telling them how strongly he was contending with Armour & Co. for a higher price and how serious the contest was. He talked to them first $175 a share, then $184, and then $190, and only brought Armour & Co. to $200 a share when Hamilton said he would take no less and that if Armour & Co. did not want

his stock at that price he was going home, and then started. It is self-evident that Armour & Co. never refused to pay $220 a share for the Stanton Company stock and were never haggling for $150, $175, then $190 a share, as Stanton contended. Armour's representatives had come out from Chicago with the at least *prima facie* belief that the stock was worth $220 a share. They paid $220 a share for the Stanton, Hample and Hamilton stock, albeit Hample and Hamilton got but $200 a share for their stock, the remaining $20 a share on their stock going into Stanton's pocket. In the agreement for purchase of the Stanton stock, Armour & Co. agreed to pay him $220 for all the rest of the Stanton stock he could pick up, no matter what price he paid for it. Stanton, under this agreement, sold the Armstrong stock to Armour & Co. (73), and Armour & Co. independently bought 100 shares of the stock from William Huntley for $220 (71), and 100 shares from F. M. Rothrock for $250 (72), afterwards compensating themselves for the excess price by buying a little of the stock for $200 a share (111). The thing speaks for itself. Armour & Co. was prepared to pay $220 for the Stanton stock and Stanton knew it was. No child but would have been aware that it was willing to pay that sum. Armour & Co. was obliged to have Stanton's co-operation in getting the stock and so they made the deal with him that is evidenced in the sale contract: that they would take any stock he could get hold of and pay him $220 for it regardless of the

price he might pay therefor. True, this agreement was not yet in writing when Stanton went to Butte, but that the promise had been made is beyond question. Though the Armour representatives had come out from Chicago on a quoted price of $220 a share and the negotiations for the purchase of the stock were still forward, Stanton went to Butte and urged strongly upon Hample and Hamilton that they sell their stock for $150 a share. These men were old friends of his. They had known him for thirty-five years. They had come to his assistance financially when the affairs of his company were in a bad way. While not testified to directly, it is apparent that they had great confidence in him, else they would not have entrusted to him the negotiations for the sale of their stock. There could have been no purpose in Stanton endeavoring, without profit to himself, to defraud these men in favor of Armour & Co. by getting them to sell their stock for less than Armour & Co. was willing to pay. The sole explanation of his efforts, both in Butte and Spokane, to get them to sell their stock for $150, then, when they declined to take that, raising the price to $175, then to $190, and finally telling them that Armour & Co. would pay $200 only when Hamilton was preparing to leave for home, is explainable in only one way: that Armour & Co. had then promised him orally, as it thereafter did in writing, to pay to him $220 a share for all the stock of the Stanton Company he could get regardless of the price he paid therefor. Of course if he could have

gotten the stock for $150 a share, so much the greater his profit. But he would pay $200 for it rather than risk the loss of a sale, for even that, it must be conceded, was a very nice little profit for this kindly president of a corporation to make out of his confiding shareholders.

As heretofore suggested, Stanton must have known from the attitude of the Armour representatives that they were willing to pay $220 a share for the stock. They had come out from Chicago to negotiate for the purchase at that quoted price. Stanton says that after they looked over the plant they came to him and said they were not interested in the option; that the stock was not worth $220 a share and they thought there was no need of further investigation, saying that they were going on to Seattle, intimating that they expected to look over the Frye plant at that place (101). In this Stanton is contradicted by the Armour representatives. O'Hern testified that after they had been looking over the plant for two or three days Stanton was told they were not in position to pay cash for the plant and that there would have to be a guaranty of the accounts and suggested that an inventory be made and the stock taken at an inventory value. Conferences continued between them, and then Stanton went over to Butte to see Hample and Hamilon. When Hample and Hamilton came back, negotiations were started on the part of the sellers at $250 a share, whereupon O'Hern told them that Armour & Co. had an option at $220. They finally came down to about $220, and

O'Hern said he would take the matter up further with Mr. Robbins (73-76). Robbins testified that the maximum that he wanted to pay for the stock as a whole was $220 a share, that the people at home had that figure fixed in their minds and that he would have let the trade drop rather than to pay any more than that for the stock, and that when Stanton wanted $100,000 "more or less" for his collateral undertakings he (Robbins) told Stanton that he would not pay over $220 on the average for the stock (98-99). When it came to finally dealing with Stanton for the purchase of the stock, Armour & Co. agreed to pay him $220 for all the Stanton Company stock he could pick up, regardless of what he paid for it. It is obvious that Stanton must have known of the willingness of Armour & Co. to pay up to $220 for the stock, and it is obvious that he would not have sold out what was practically the controlling interest in the company for a much smaller sum than Armour & Co. was willing to pay for small lots.

Again, Stanton says that he agreed to sell his stock for $200 a share, but that Armour & Co. then asked these collateral undertakings and he balked unless they were willing to pay him $100,000 therefor. They turned and twisted and wriggled, but finally got their offer up to what he estimated would be approximately $100,000, and he then accepted it. He makes it plain, however, that while he would have sold his stock for $200 a share, he positively would not enter into the collateral undertakings unless he received approxi-

mately $100,000 over and above the $200 a share. Now Stanton admits that when he went to Butte he strongly urged Hample and Hamilton to sell their stock for $150 a share if they could not get more, telling them that he was willing to sell his stock for that if they could not get more, and he says upon his representations they finally agreed with him to take $150 if a higher price could not be obtained. Fifty dollars a share on Stanton's 2420⅔ shares is over $120,000. It would seem that when Stanton had gotten Armour & Co. up to $200 a share for his stock, which was more than $120,000 in excess of what he would have been willing to sell for if necessary, he would not have haggled over entering into the collateral agreements they requested and demanded as a *sine qua non* that they pay him an additional $100,000.

Still another consideration. In arguing Stanton's unwillingness to enter into these collateral agreements unless the further sum of $100,000 was paid him over and above the $200 for his stock, which consideration is based upon Stanton's agreement not to enter the meat business in four designated states for a period of ten years, it is urged that this was a very valuable agreement for which he should have been well paid. O'Hern says, however, that when these collateral undertakings were suggested to Stanton he (Stanton) made not the slightest difficulty about agreeing not to go into the business in the four designated states, saying that he wanted to get out of the business, that he

needed a rest, and his son would not take it up and that he was therefore quite willing to guaranty that he would stay out of the business (79).

Next it is urged against the instruction under consideration that it authorizes a recovery against Stanton of $20 a share on the stock owned by Hample and Hamilton, and that this was erroneous because Stanton had paid, or was obligated to pay, a commission of two per cent. to Grinnell for selling the stock, and the amount of this commission should have been deducted from the recovery because Stanton did not really receive $20 a share on Hample's and Hamilton's stock, but $20 a share less two per cent. as the commission for selling it.

This is another of the notions utterly unsupported by evidence and flatly in conflict with the theory upon which Stanton's case was tried below which the exigencies of the situation have evolved from the fertile brains of Stanton's present counsel. They say that the very foundation of this action was the option given by Stanton to Grinnell (Brief p. 47). It is true a writing was put in evidence whereby Stanton agreed to pay Grinnell a commission of two per cent. if within fifteen days he produced a purchaser who could and would pay $220 a share in cash for the stock (39). But it is, of course, among the fundamentals of the law that a broker is not entitled to a commission unless he produces a purchaser ready,

able and willing to purchase upon the terms on which the vendor has agreed to sell. It is conceded that there was a departure from the terms of the Grinnell option in that Armour & Co. did not pay cash for the stock, only a comparatively small sum being paid in cash, the remainder being paid at varying intervals. Moreover, it was Stanton's prime contention through the trial of this case that Armour & Co. paid but $200 a share for his stock and for Hample's and Hamilton's stock. He so pleaded in the affirmative defense set out in his answer (12), he so testified (103-105), he requested an instruction to the jury in which that view was embodied (122-123), and the requested instruction was given (131-133). True, Stanton might have waived the terms of sale and the price stated in the Grinnell option, or might by some modified agreement have rendered himself liable to pay a commission to Grinnell, although Grinnell did not produce a purchaser under the terms of the original option. It is certain, however, that Stanton denies any waiver of the terms or price stated in the Grinnell option and denies any liability to pay Grinnell a commission. It is true that Grinnell seemingly takes a different view of the situation, for there was read in evidence in this case a portion of Stanton's cross examination in an action brought against him by Grinnell to recover a commission (32-36) in which Stanton took the same position that he is taking in this case, *viz.*, that no sale was made to Armour & Co. under the terms of the Grinnell option, but that he, Hample and Hamilton were paid but $200 a share

for their stock, the greater consideration paid Stanton being for his agreements collateral to the sale. In conformity with Stanton's position in the Grinnell action as well as in this, his counsel in this case requested an instruction that the so-called Grinnell option was without consideration, that Stanton could rescind it at any time, and that it was not binding upon him unless Grinnell produced a purchaser under it (124). This instruction was given with the addendum that the jury was not to consider the option for any purpose except so far as it might assist in determining what the consideration for the sale of the stock actually was (134).

Counsel devote much of their opening brief to an argument that it was error to give an instruction which there is no evidence to support, a contention with which any lawyer would agree as of course. Adopting their argument and applying it to the particular contention under discussion, it would have been clear error to submit to the jury the question of whether Stanton had paid, or was liable to pay, Grinnell any commission, and, if so, what the amount was and whether it ought to be deducted from any recovery awarded against Stanton. There is not an atom of evidence that Stanton waived the terms of purchase stated in the Grinnell option, there is not an atom of evidence that Grinnell became entitled to any commission under the option, and there is not an atom of evidence that Stanton has paid Grinnell any commission, or admitted liability to pay any commission,

or that any liability to pay a commission has been established against him. Giving effect not only to the direct evidence but to every reasonable inference which can be drawn from the evidence, no more appears than that Grinnell was employed to find a purchaser for the stock at a stated price and upon stated terms, that he did not procure a purchaser at the terms stated, the customer he produced buying upon other terms, that Stanton claims there was not only a deviation from the terms of the purchase but from the price fixed in the option, and that litigation is in progress between Stanton and Grinnell over the question of whether Grinnell earned a commission. The contention that there should have been submitted to the jury the question of whether Stanton had paid or was liable to pay Grinnell any commission, and, if so, the amount thereof, and whether it should have been deducted from the amount of the recovery, is patently absurd.

Moreover, the authorities heretofore cited establish beyond dispute that a party must adhere in the appellate court to the position he took in the lower court. Stanton's position in the lower court was that Grinnell's customer not only did not pay cash but that it paid only $200 a share. If that were so Grinnell earned no commission unless there was a new or modified agreement made with him, a situation nowhere suggested. Stanton's trial counsel, proceeding agreeably to Stanton's contention, requested and procured an instruction to the effect that the option was

not binding upon him and that the jury should only consider it so far as might aid in determining the actual consideration for the sale of the stock. In flat contradiction of that position Stanton's present counsel come into this Court and say that the very foundation of the action is the Grinnell option, and that the jury ought to have given it effect, or have been permitted to give it effect, by deducting from the amount of any recovery from Stanton the commission stipulated in the option. If the use which they request this Court to make of the option is not in the teeth of the use which Stanton's counsel procured the court to instruct the jury could be made of it, there is no understanding the meaning of the English language.

A further and equally conclusive reason why there was no error in the instruction under discussion is that it is a correct statement of the law according to the theory of the evidence maintained by the plaintiff, and if there was any other view that could be taken of the evidence, any view which is in accord with counsel's contention in this Court, it was the duty of counsel to request an instruction concerning that view of the trial court. Wanting such request, error cannot be based upon the omission to instruct upon the view now advanced.

It is the law, of course, that in an action for money had and received plaintiff can only recover such sum as in equity belongs to him, and if equity requires that Hample and Hamilton should pay any commission which it may be assumed Grinnell is in position

to collect from Stanton rather than that Stanton should be compelled to pay it, then the amount of such commission, whatever it may be assumed to be, should be deducted from the recovery. It is too plain for discussion, however, that Hample and Hamilton ought not to be charged with the payment of a commission to Grinnell if it is assumed that any is to be paid him. They did not employ him to sell their stock nor authorize Stanton to do so. They did not wish to sell and only did so at Stanton's urgent solicitation. Grinnell was merely an instrument, albeit an innocent one, in Stanton's scheme for gulling them. Assuredly equity does not demand that a person suing to recover money of which he has been cozened shall pay the expenses incurred by the cozener in perpetrating the deceit.

Moreover, the first intimation that Hample and Hamilton had of Grinnell's connection with the sale was the night before the sale was closed, when Stanton told them casually that Grinnell was claiming a commission, but that it did not amount to anything and he would take care of it, having planned to do so out of his $25,000 note which they had cancelled and the automobile which they had given him at his request (48-49, 55-56).

In this state of the evidence, the utmost that counsel can claim is that there were two views of the transaction which might have been submitted to the jury. The first would be that Grinnell's claim was not a factor in the controversy between Hample and

Hamilton and Stanton, and that if they were entitled to recover anything from Stanton they were entitled to recover the full amount of their money which he had obtained, regardless of any claim Grinnell might have against him growing out of the transaction by which it was obtained. This was the view embodied in the instruction complained of. The second view would be that there was evidence from which the jury might say that Stanton had paid, or would be liable to pay, Grinnell a commission in some assumed amount for selling the stock, and that in equity and good conscience any such amount ought to be taken out of the money of Hample and Hamilton that Stanton had in his possession. Under the most fundamental rules of appellate procedure, the omission to state this second theory of the evidence to the jury cannot be complained of in this court because there was no request in the trial court for an instruction presenting it. On the contrary, it is assumed in all the instructions requested in Stanton's behalf that if there could be any recovery at all against him it must be for the $20 a share upon their stock which Hample and Hamilton claimed he had obtained, and Stanton's counsel requested and secured an instruction eliminating the Grinnell option from consideration except for the purpose of aiding the jury in determining what was actually paid for the stock (120-124). It is no ground for reversal, says the Supreme Court, that a trial court omitted to give directions to the jury upon points of law which might arise in the cause when not requested to do so by either party, for it is sufficient

for the appellate court that no erroneous instructions were given. If either party deems any point presented by the evidence to be omitted from the charge, he must require an opinion from the court upon that point and if he do not do so there is a waiver of it. *Pennock v. Dialogue,* 2 Peters 1, 15. If a charge does not go far enough it is the privilege of counsel to call attention to any omission and request an instruction upon it, and if such request is made and refused and an exception saved, the appellate court will consider whether there was error in the refusal.

> "But the mere omission to charge the jury on some one of the points in a case when it does not appear that the party feeling himself aggrieved made any request to the court on the subject cannot be assigned for error."
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> *Express Co. v. Kountze Bros.,* 8 Wallace, 342, 354.

In a criminal case it was objected that it was error to charge that the *corpus delicti* could be established by circumstantial evidence without saying that such evidence should have been sufficient to create cogent, irresistible grounds of presumption. The Supreme Court said that without any request on the part of the defendant to add the qualification suggested there was no error in the charge actually given, for it is no ground of reversal for a court to omit to give instructions which are not requested by the defendant. *Isaacs v. United States,* 159 U. S., 487, 491.

So where there were several pleas filed by the defendant, error cannot be assigned upon the failure of

the court to charge upon the issue raised by one of them where it does not appear that the court was requested to charge upon that issue. *Carter v. Carusi,* 112 U. S., 471, 484.

In the late case of *Illinois Central Ry. v. Skaggs,* 240 U. S., 66, 72, it was said that if a plaintiff in error "desired any addition, amplification or qualification (to an instruction) in order to present its point of view to the jury, it should have made appropriate requests therefor," and in the absence of such a request error assigned upon the instruction would not be considered. See also *Phoenix Ry. v. Landis,* 231 U. S., 578.

This Court has held that it would not consider error assigned upon an instruction respecting adverse possession, the claim of error being that the term "adverse possession" was not correctly defined in that it did not include all the elements thereof, when no instruction including such elements was requested. *Eastern Oregon Land Co. v. Cole,* 92 Fed., 949. See also *Western etc. Land Co. v. Scaife,* 80 Fed., 353.

This Court has also held that the claim that a servant was injured when violating a statute cannot be considered when such claim was not brought to the attention of the trial court by a request for an instruction or in any other manner. *Federal etc. Co. v. Hodge,* 213 Fed., 605.

Turning to the decisions of other Federal Courts, it is held that a defendant cannot complain of the trial

court's omission to instruct the jury as to the measure of damages when it has failed to request a proper charge on the point. *Texas etc. v. Cody,* 67 Fed., 71. In an action to recover for the death of a wife, the omission of the court to charge that in assessing damages the cost of the wife's maintenance during the probable life expectancy should be deducted from the total damages awarded is not error when no request for such an instruction was made. *Grand Trunk Ry. v. Gilpin,* 208 Fed., 126. When the lower court instructed the jury that certain evidence might be considered in mitigation of damages, his omission to state that it could be considered only for such purpose cannot be assigned as error when no instruction to that effect was requested. *Young v. Corrigan,* 210 Fed., 442. Error cannot be predicated upon an omission to instruct on a point in issue when no instruction thereon was requested. *Stephenson v. Atlantic etc. Co.,* 230 Fed., 14. When no instruction is requested on a particular defensive theory, the failure of the court to instruct thereon is not reversible error. *Waters v. Guyle,* 234 Fed., 532.

Next it is urged, in effect, that the jury should have been instructed to take into consideration in determining the amount of the plaintiff's recovery the individual contributions made by Stanton to the subject of sale which, say counsel, induced the payment of the purchase price of $220 a share, such as his agreement to stay out of the meat business in four states, his

guaranty of accounts, etc.

The same considerations control this contention which control the contention just preceding it. The evidence bearing upon Stanton's claim that the sum which was paid him over and above $200 a share was paid in consideration of those collateral undertakings was not introduced for the purpose of minimizing the recoveries of Hample and Hamilton in case the jury found in their favor, but as a complete refutation of their theory to recover, *viz.*, that $220 a share was in fact paid for all their stock but that by deceit Stanton had diverted $20 a share on their stock to his own pockets. That such was the purpose, and the sole purpose, of the evidence introduced by him is made clear by his answer and by the whole course of the evidence. It is put beyond peradventure by the instructions requested by Stanton's counsel, which state first the essential facts which the plaintiff was bound to establish by a preponderance of the evidence in order to recover (120-121), and which then state in opposition the defendant's contention and the use, if believed, which the jury should make of the evidence that Stanton was paid but $200 a share for his stock and that the additional $92,000-odd that was paid him was for his collateral undertakings (122-123). From first to last, in pleadings, evidence, and requested instructions, there is no suggestion from Stanton that the state of facts for which he contended could or should be used in any way to minimize the recovery against him in the event that the jury found in the plaintiff's favor.

His whole contention was that the state of facts to which he testified was a complete defense to the action and prevented any recovery whatsoever. It would be an outrage upon the principles of fair dealing and common decency toward the trial court and the opposing party which have induced the rules of appellate practice that a party must adhere in the appellate court to the theory he proceeded upon below and will not be heard to urge in the higher court a point he did not suggest in the lower court, if Stanton's present counsel should now be heard to urge that the lower court should have instructed the jury, notwithstanding no request for such an instruction was made, that it ought to minimize the amount of any recovery awarded the plaintiff by the amount that it should find Stanton's collateral undertakings had to do in the fixing of the purchase price.

Finally it is urged against the instruction that it combines three different theories of recovery, *viz.*: that plaintiff was entitled to recover on the theory that Stanton was his agent, on the theory that Stanton committed a fraud upon him, and on the theory that there was an implied contract, under the doctrine controlling an action for money had and received, that Stanton should pay him the amount demanded. The contention is palpably absurd. The instruction states nothing but the essentials of a cause of action for money had and received. The pivotal point which was by the instruction submitted for the jury's de-

cision was whether Stanton had received $20 a share on the plaintiff's stock which ought rightfully to have been paid to plaintiff. Of course factors facilitating that result, such as that Stanton was enabled to get the plaintiff's money by inducing plaintiff to let him (Stanton) negotiate the sale to Armour & Co. and then representing to plaintiff that but $200 could be gotten for the stock, all of which factors are covered by pleading and evidence, were referred to in the instruction. It is arrant nonsense, however, to say that a cause of action to recover money rightfully belonging to plaintiff which the defendant had obtained without the plaintiff's consent becomes something else than a cause of action for money had and received because the defendant was enabled to get the money without the plaintiff's consent by violation of a duty which he owed to plaintiff and by a fraud practiced upon him. The plaintiff has pleaded and proved a cause for money had and received, and it is such and not something different, or a combination of that and something else, because it was through trickery and deceit that the defendant was enabled to get his hands on the money.

As counsel enlarge and make much of this theory later on we shall reserve for that head fuller discussion of it.

II.

Counsel have isolated parts of three different instructions, and of these make complaint under their second head. This practice of attempting to elude consideration of the instructions as a whole and to assign error upon isolated portions is, it must be conceded, ancient, although it has not become honorable with age. While even the isolated scraps complained of are not objectionable, in fairness their relation to the remainder of the instructions should be established before entering on their discussion, and to that preliminary task we now address ourselves.

After fully stating the issues made by the pleadings, the lower court instructed the jury that the burden was upon plaintiff to prove every fact material to a recovery by a fair preponderance of the testimony; that if it found from a preponderance of the testimony that the defendant agreed to and did conduct the negotiations which resulted in the sale of the plaintiff's stock to Armour & Co., that the plaintiff had no information concerning the price which Armour & Co. was willing to pay or the defendant was to get for his stock except such as the defendant gave him, that by reason of the defendant's misstatements or concealment the plaintiff was induced to accept $200 a share for his stock, whereupon $20 a share on the number of shares owned by him was, without his knowledge or consent, added to the price paid defendant for his stock, and that the $20 a share on plain-

tiff's stock was added to the price paid the defendant for his stock because Armour & Co. had been able to get the plaintiff's stock for $200, then their verdict should be for plaintiff. On the other hand, the jury was told, the plaintiff could not recover if the jury found that he fixed his own price and conducted his own negotiations for the sale of his stock, even though defendant received a larger price for his stock, unless it found from a preponderance of the testimony that a part of the consideration paid for the plaintiff's stock was actually paid to and received by the defendant and is still retained by him; in the latter event the plaintiff was entitled to recover regardless of the question of agency (129-130). The latter part of this instruction is complained of by the second specification of error.

The court then took up and gave the defendant's first requested instruction (120-121), by which the jury was instructed that plaintiff's theory of the case was that the plaintiff authorized the defendant to sell his (plaintiff's) stock at the same price the defendant should sell his stock; that the defendant falsely represented that the selling price was $200, in reliance upon which the plaintiff sold his stock for that price, when in fact the defendant obtained from Armour & Co. $220 a share on the sale of the plaintiff's stock; that for the plaintiff to recover on that theory he was required to establish by a preponderance of the evidence: (a) That the plaintiff authorized the sale of, and the defendant agreed to sell, the plaintiff's stock at the

same price the defendant received for his; (b) That the defendant sold the plaintiff's stock or induced the plaintiff to sell it; (c) That Armour & Co. agreed to pay $220 a share for the plaintiff's stock; (d) That Armour & Co. actually paid or agreed to pay $220 for plaintiff's stock, paying or agreeing to pay $20 thereof to the defendant; (e) That if the defendant had failed to establish any one of these propositions by a preponderance of the evidence he could not recover on that theory (130). So far the instruction was as requested by the defendant. The court added this proviso: that if it appeared from a preponderance of the evidence that a part of the consideration for the sale of the plaintiff's stock was in fact paid or agreed to be paid to the defendant by Armour & Co., the plaintiff could recover so much of the sum so paid as was still retained by the defendant (131). It is this proviso of which the defendant complains by his third specification of error.

Still following the defendant's requested instructions (121-122), the jury was next instructed that if the defendant did not sell the plaintiff's stock, but that plaintiff sold his own stock and fixed its selling price at $200, he could not recover (131). To this was added the proviso that there could be no recovery "unless, as already stated, you find from a preponderance of the testimony" that a part of the consideration for the sale of the plaintiff's stock was actually paid to the defendant and retained by him. This proviso is complained of by the fourth specification of error.

Immediately succeeding the foregoing, the defendant's third requested instruction (122-123) was given. By this all the elements of Stanton's contention were fully stated: that he sold no stock but that of himself and family, and for it received but $200 a share, the remainder of the consideration paid him being for his collateral undertakings; and the jury was told that if it found such to be the case, then it must find as a fact that Stanton sold his stock for the same price at which the plaintiff's stock was sold, and that the plaintiff could not recover although it appeared that the defendant did in fact sell the plaintiff's stock; that if the $92,-266.66 which was paid the defendant in excess of the price of $200 a share for his stock was actually paid him as a consideration for his collateral undertakings and not as a part of the purchase price of his, Hample's and Hamilton's stock, the plaintiff could not recover; that it was immaterial how the sum of $92,-266.66 was arrived at, whether by taking the total number of shares owned by the defendant, Hample and Hamilton, and multiplying it by $20, or otherwise; that if in fact that sum was paid him as the consideration for his collateral undertakings, and not as a part of the purchase price of his stock and Hample's and Hamilton's stock, the plaintiff could not recover (131-133).

Reading these instructions as a whole, it appears so clearly that even the dullest mind could not misunderstand that these three propositions were stated to the jury:

(1) That plaintiff was entitled to recover if the defendant conducted the negotiations for the sale of the plaintiff's stock, and by defendant's deceit the plaintiff was induced to accept $200 a share for his stock, whereupon $20 a share on the stock owned by him was added to the price paid defendant for his stock; this being because Armour & Co. had been able to get plaintiff's stock for $200 instead of paying the $220 therefor that it was willing to pay.

(2) That plaintiff was not entitled to recover if he conducted his own negotiations for selling and fixed the selling price of his stock, even though defendant received a greater price for his stock, unless the jury found that a part of the consideration for the sale of plaintiff's stock was actually paid to, received, and retained by defendant.

(3) That plaintiff was not entitled to recover although it appeared that the defendant did in fact sell plaintiff's stock if defendant received no part of the purchase price of plaintiff's stock and sold his own stock for $200 a share, the same price that plaintiff received for his; the remainder of the consideration paid defendant being for his collateral undertakings.

The law applicable to the issues and evidence involved is fully covered by these three propositions, and it is stated without tautology or redundancy. The first proposition covered all for which the plaintiff contended by pleading and evidence. It is that if defendant undertook to sell the plaintiff's stock and by

deceit induced plaintiff to sell it for $200, and that because of defendant's success in getting it for $200 Armour & Co. paid defendant $20 a share on the number of shares owned by plaintiff, then defendant had money rightfully belonging to plaintiff which ought in equity and good conscience to be paid plaintiff. Manifestly a case of deceit in a confidential relation is stated, and manifestly a court of equity would not allow the defendant to retain money so obtained. But the plaintiff was not obliged to go into equity to secure relief from the wrong done him.

> "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received."
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> *Gaines* v. *Miller,* 111 U. S. 395, 397.

> "This action was properly brought for money had and received. This action lies in all cases for the plaintiff's money in the hand of defendant, which in equity and good conscience he has no right to obtain, and it is necessary for the plaintiff to prove only two things—his right to the money, and the defendant's possession. 'Whenever the plaintiff could recover in a court of equity, he can recover in an action for money had and received.' Chitty on Contracts, 474; 2 Tr. 163; 1 Cowper, Rep. 372; Smith v. Bell, 6 Pet. (U. S.), 68, 8 L. Ed., 322."
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> *Rhodes* v. *Jenkins,* (Ga.), 58 S. E., 897, 898.

An agent entrusted with the sale of land represented to his principal that it could only be sold for a stated price, and obtained a conveyance to himself in order to consummate the sale. Subsequently he sold

the land to another at a price in excess of that paid his principal. Held, that while the confidential relation and fraud involved might well give a court of equity jurisdiction to grant relief, the defrauded principal was not obliged to seek relief there but could sue in assumpsit for money had and received; that the same facts which would entitle him to relief in a court of equity entitled him to relief at law.

> "We understand the law to be well settled, that the action of *assumpsit* for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties, and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action."
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> *Moore* v. *Mandlebaum,* 8 Mich., 432, 447.

Several persons associated themeslves together for the purpose of buying a mine, each contributing a stated sum to the purchase price. The purchase was entrusted to two of their number, who made a secret profit in completing the purchase. Held, that a joint action in assumpsit by the defrauded partners would lie against those making the secret profit.

> "This was assumpsit for money had and received, and we think the action was properly brought. Under the findings of the jury, the de-

> fendants unlawfully and fraudulently received the money of the plaintiffs, and hence have no right to retain it. The plaintiffs, waiving the tort, brought this action to recover the money of which they had been fraudulently deprived. The action lies on the implied promise to repay the sum unlawfully withheld. Mr. Greenleaf (2 Greenl. Ev. p. 102) says: 'Where the defendant is proved to have in his hand the money of the plaintiff, which aequo et bono he ought to refund, the law conclusively presumes that he has promised so to do, and the jury are bound to find accordingly; and after verdict the promise is presumed to have been actually proved."
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> *Humbird* v. *Davis* (Pa.), 59 Atl., 1082, 1085.

The authorities leave no manner of doubt that where through fraud, duress, extortion, or imposition of any sort, one person has obtained money which *ex aequo et bono* belongs to another, it may be recovered by an action for money had and received. *Bither* v. *Packard* (Me.), 98 Atl., 929, *Young* v. *Taylor*, 36 Mich., 25, *Williams* v. *Smith* (R. I.), 72 Atl., 1093, *Sarasohn* v. *Miles*, 65 N. Y. Supp. 108 (Affd. 61 N. E., 1134), *Heywood* v. *Assur. Co.* (Minn.), 158 N. W., 632, *Dobson* v. *Winner*, 26 Mo. App., 329.

The first proposition submitted to the jury, then, was whether Stanton made use of his position as agent for the sale of Hample's and Hamilton's stock to deceive them and get $20 a share on their stock which ought rightfully to have been paid them. The above authorities make it manifest that if he did the jury was required to find for them. However, they

would equally be entitled to recover although the jury found against the fact of agency if in fact Stanton got money belonging to them and to which he had no shadow of right. Of course if he did in fact receive but $200 a share for his stock, the same price that was paid Hample and Hamilton for their stock, and the remaining $92,266.66 which was paid him was a *bona fide* consideration for his collateral undertakings, it is clear he got no money which belonged to them and the jury should have found in his favor. And so the jury was told, clearly and emphatically (131-133). But it is equally clear that when one person has received money which actually belongs to another without such other's consent and without giving any valid consideration therefor, the money can be recovered by an action for money had and received. 27 Cyc., 860. That is all there was to the criticized instructions; the jury was told that if it found from a preponderance of the testimony "that a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him" then it should find for the plaintiff "regardless of the question of agency" (129-130). Manifestly that instruction, even though it stood alone and was not to be read as a part of the entire instructions, was a sound statement of the law. As we shall hereinafter demonstrate by reference to many authorities, whenever one man has another's money which he has obtained and retains without right, he can be forced to disgorge by this sort of an action. It is true that if the criticized in-

structions stood alone, and were not supplemented by the other instructions, they are not so complete as they might have been made or, probably, as the trial judge would have made them if he had given no other instructions touching the evidence necessary to sustain the action. As has been seen, however, complaint cannot be made of an instruction which is sound so far as it goes because it is not so complete as it might have been made. Omission in instructions can only be complained of where a proper request to make them more complete is made, refused, and an exception taken. See authorities cited, *supra*. We repeat that the law is clear that when one man gets and retains another man's money without right, an action of this character will lie. That is the primary rule of the law and that primary rule was stated in the criticized instructions. If, as said by the Supreme Court in *Ry. Co.* v. *Skaggs*, 240 U. S., 66, 72, the plaintiff in error "desired any addition, amplification or qualification" to or of the instruction, appropriate requests therefor should have been made.

At any rate, the undisputed facts in this case are such as to make the instructions in question peculiarly sound. If a part of the consideration for the sale of the Hample and Hamilton stock was in fact paid to and retained by Stanton, his relation to them, and his concealment of matters vitally affecting the transaction, were such that he could not in equity and good conscience keep it. And this is so, be it most emphatically remarked, although he was not authorized by

them to sell their stock, and although he may have made no outright misrepresentations to them. Stanton was the largest shareholder in and the president, general manager and virtual dictator of the Stanton Company. He had, as his counsel say in their brief (p. 79) "nearly exclusive control of the conduct of the business." The plant was located at Spokane and Hample and Hamilton lived at Butte. Stanton himself says they "had nothing to do with the management of the business. They came over to Spokane from time to time and I would tell them as near as I could all about everything and all about the business" (100). Their testimony indicates even a slighter knowledge of the business and the value of the property than does Stanton's (49, 51, 66-67). It is generally accepted that the mere fact that a person is a director of a corporation imposes no fiducial obligation upon him in dealing with a shareholder concerning the latter's stock. But few special facts are needed, however, to create a fiducial obligation in such a case. Those facts are present here. Hample and Hamilton had known Stanton for more than 30 years. They had long been shareholders in the Stanton Company. Stanton knew the business and its value intimately, thoroughly; they knew nothing of either except what he told them. When the prospect of a sale to Armour & Co. came up he went to Butte to endeavor to induce them to sell. He himself says that he strongly urged them to sell; told them conditions were unsettled; that they had a lot of frozen meat on hand; that livestock was going higher; that many repairs had to be made,

which would cost at least $150,000; that Armour & Co. was obliged to have a plant in the Northwest and if it did not get the Stanton plant would probably build one of its own at Spokane; that if it did build there it would be a hard competitor and business would be much harder. As a result of his urgings (he says) it was decided they would all sell for $150 if they could not get more (101-102). Now, whatever the rule when no special facts are present, it is well settled that when the dominant officer in a corporation, one in control of its affairs and knowing the value of its property and the consequent value of its stock as its shareholders do not, uses his knowledge and the influence due to his position to purchase or induce the sale of the stock of shareholders, he occupies a fiduciary relation to them, and in his efforts to induce a sale he must neither misstate nor conceal any fact which would affect the price which they could or ought to get for their stock. If he does, the sale should be set aside. *Strong* v. *Repide*, 213 U. S., 419, 431-434, *Oliver* v. *Oliver* (Ga.), 45 S. E., 232, *Stewart* v. *Harris* (Kan.), 77 Pac., 277, *Commonwealth etc.* v. *Seltzer* (Pa.), 76 Atl., 77, *George* v. *Ford*, 36 App. D. C., 315, *Black* v. *Simpson* (S. C.), 77 S. E., 1023, *Fisher* v. *Budlong*, 10 R. I., 525, *Hume* v. *Steele* (Tex.), 59 S. W., 812. In the case at bar, there is, in conjunction with the undisputed evidence as to Stanton's influential position in the Stanton Company and knowledge of its affairs and the extraordinary effort he made to induce Hample and Hamilton to sell their stock, evidence for the jury (heretofore re-

ferred to in detail and therefore merely sketched in here) that the Armour representatives came to Spokane expecting that they would need to pay $220 for the stock if they got it; that after examining the plant they were willing to pay that price for the stock; that they agreed to pay Stanton $220 for his stock and for any other stock he could get for them, regardless of what he paid for it; that it was because of this agreement that he endeavored to get Hample and Hamilton to sell their stock for $150, then $175, then $190, only telling them that the Armour representatives would pay $200 to prevent the breaking off of the deal; and that Armour & Co. afterwards paid him $220 a share for his stock, then added to it $20 a share for the number of shares owned by Hample and Hamilton, the latter payment being made because Armour & Co. were willing to pay $220 for the stock and paid it to Stanton instead of Hample and Hamilton because he succeeded in getting them to take $200 for their stock. We do not say, of course, that all this evidence is direct or uncontroverted. We merely say there was direct evidence to, and evidence from which the jury could properly infer, the state of facts above outlined. Controverted though some of it was, it was for the jury to say whether or no the facts above stated were established by the evidence, and this the defendant's counsel admitted by their failure to challenge the sufficiency of the evidence at any time or in any manner.

Summing up the two propositions, then, the first

combined agency with the other facts which the jury was required to find in order to return a verdict for the plaintiff. The second assumed that the jury might find the fact of agency not established by the evidence, in which event it was told that it could not return a verdict for plaintiff unless it found that "a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him." Considering the position that Stanton occupied in the Stanton Company, the efforts he made to induce Hample and Hamilton to sell their stock, the knowledge which the jury was entitled to find that he had of the price Armour & Co. was willing to pay for the stock and the pecuniary interest he had in inducing them to sell their stock for a less price, it is patent that if the jury found that under such conditions Stanton received a part of the consideration poid for their stock he ought to be required to pay it over to them, "regardless (as the trial court said) of the question of agency" (129-130). It clearly was money which in equity and good conscience he ought not to retain.

Equally clearly, if he could not conscientiously retain the money it could be recovered from him in this action. The action for money had and received is an amazingly effective instrument for penetrating artifices, devices, forms and technicalities, uncovering the real nature of a transaction, and then doing what everyday, common sense justice requires between the parties. It is, said Lord Mansfield, "a liberal action

founded upon large principles of equity", and lies whenever one who has received money cannot conscientiously retain it. It is "less restricted by technical rules than most others, as it aims at the mere justice of the case, and looks entirely to the question whether the defendant holds the money which in equity and good conscience belongs to the plaintiff." *Hoxter* v. *Poppleton,* 9 Ore., 481, 483. Judge Hawley said that "in order to support an action of this character there need be no privity of contract, except that which results from one man having another's money, which he has no right to keep. In such cases the law implies a promise that he will pay it over." *Leete* v. *Mining Co.,* 88 Fed., 957, 964. Affirmed by this Court, 94 Fed., 968. See also: *National Bank of Commerce* v. *Equitable Trust Co.,* 227 Fed., 526. Money was delivered to a carrier for carriage. He lost it at gaming. Held, the consignor could recover the money from the winner by an action for money had and received, the law implying a promise to pay "where one has received the money of another, and has not the right conscientiously to retain it." *Mason* v. *Waite,* 17 Mass., 560, 563. The holder of a warrant issued by a drainage district sued a county to recover the amount of the warrant, alleging that the county had improperly diverted to its own purposes the funds of the drainage district, and thus left the latter without means to pay the warrant. Held, that an action for money had and received would lie; that in such a case the question is: "To which party does the money in equity, justice, and law, belong?"; that the

funds of the drainage district ought to have been used in payment of the warrant, and therefore the county which had taken them without right, could not "in equity and good conscience" refuse to pay them to the holder of the warrant. *Board of Comm'rs.* v. *Dredging Co.,* 251 Fed., 249, 252. A loan of money was made which the borrower intended to secure by a mortgage on his crop, but by mistake the note and mortgage was made to another person. The latter foreclosed the mortgage. Held, that the lender could recover the money made by the foreclosure by an action for money had and received. *Boyett* v. *Potter* (Ala.), 2 So., 534. Of similar purport is *Heard* v. *Bradford,* 4 Mass., 326, where a claimant to a fund was held entitled to recover it from another claimant to whom it had been paid by mistake. In *Smith* v. *Lumber Co.,* 81 Wash., 111, an award in condemnation proceedings was paid into court. There were two claimants to the fund. The lower court held one of them, a corporation, entitled to the fund, and upon receiving it the corporation divided the fund among its shareholders, leaving the corporation insolvent. On appeal the other claimant was found entitled to the fund, and it was held that he could recover it by an action for money had and received against the corporation and its shareholders who had received the fund, although they had taken it in the honest belief that they were entitled thereto, because it is elementary that "whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money

had and received."

For other cases illustrating the efficiency and adaptability of the action for money had and received as an instrument for achieving justice in despite of forms and technicalities, see *Caldwell* v. *Maxfield* (S. D.), 64 N. W., 166, *First State Bank* v. *McGoughey* (Tex.), 86 S. W., 55, *Bates-Farley Bank* v. *Dismukes* (Ga.), 33 S. E., 175, *Law* v. *Uhrland,* 104 Ill., App., 263, *Montgomery* v. *Wise* (Mo.), 120 S. W., 100, *Cosmopolitan etc. Co.* v. *Koegel* (Va.), 52 S. E., 171, *Brooks* v. *Bank* (Okl.), 110 Pac., 47, *Richardson* v. *Drug Co.,* 92 Mo. App., 532.

In the light of the foregoing authorities, it cannot be doubted that the instructions when viewed as a whole were faultless. First the jury was told that if Stanton, acting as agent for the sale of Hample's and Hamilton's stock, by deceit got $20 a share on it which ought to have been paid to them it should find against him. Certainly that instruction was sound. Next it was told that if it found there was no agency there could be no recovery unless it found that a part of the consideration for the Hample and Hamilton stock was actually paid to Stanton. That is simply a statement of a well recognized primary rule of law, namely, that when one person gets another person's money without right, the other can recover it from him. That is sound law although no special circumstances were present. Considering Stanton's position, his earnest, almost desperate efforts to get Hample and Hamilton to sell their stock for a much

lower price than Armour & Co. would have paid for it, and the inference which the jury might justifiably draw from the whole transaction, namely, that Stanton expected to and actually did make a profit upon the sale of the Hample and Hamilton stock to the extent of the difference between what he could get it for and the $220 Armour & Co. was willing to pay, there can be no doubt of its soundness. Followed up, as these instructions were, by an instruction given verbatim as requested by Stanton's counsel, wherein his contentions were stated in detail, namely, that he, like Hample and Hamilton, was paid but $200 for his stock, that he received nothing on account of the sale of their stock, the remainder of the consideration received by him being paid for his collateral undertakings (131-133), and whereby the jury was told that its verdict must be in his favor if it found the facts as he claimed, no ground is left for reasonable or fair criticism of the instructions as a whole.

So much for the instructions as a whole. Now to the points which counsel make against the three portions they have isolated.

First it is said the scraps criticized are not supported by pleading or evidence. In so far as that claim is based on the contention—which is in fact its principal foundation—that there is no evidence to impugn Stanton's testimony that he was paid but $200 for his stock and the remaining consideration was

paid for his collateral undertakings, we shall decline to discuss it. It is plain that if there is no evidence to the contrary a challenge to the sufficiency of the evidence should have been sustained. Not only was no such challenge made, but Stanton's counsel, proceeding on the assumption that there was evidence in support of the opposed theories urged by the plaintiff and by the defendant, and that it was for the jury to determine which theory the evidence sustained, requested and were granted an instruction as to the burden borne by the plaintiff (120-121, 130-131), and also one which submitted to the jury as a question of fact whether Stanton's contention was sustained by the evidence (122-123, 131-133). The cases cited under the first head of this brief make it clear that Stanton's present counsel will not be heard in this Court to contend that there was no question of fact for the jury upon the opposed theories of the parties.

A supplementary contention is made, however, which is that with the question of agency eliminated, and in the absence of fraud or misrepresentation—of which, it is assumed, there is none—Stanton was at liberty to make any agreement with Armour & Co. that he could for making a profit out of the sale of the Hample and Hamilton stock, and this privilege was denied him by these instructions, wherefore there was error.

Assuming that under the circumstances here appearing the law is as counsel baldly state it, the requested instructions do not touch such a situation.

There is nothing in them to suggest that it would not be permissible for Stanton to make a legitimate profit out of the sale of the Hample and Hamilton stock to Armour & Co. There is no hint in them that if Stanton went as a broker from Armour & Co. to buy the Hample and Hamilton stock and made a profit in so acting he could not retain it. The instructions simply are that if a part of the consideration for the sale of the stock owned by Hample and Hamilton was paid to Stanton he could not retain it. That is merely a statement of the unquestioned fundamental principle governing actions for money had and received, *viz.,* that where one person has without consideration received another's money, he cannot retain it upon the demand of the other that he pay it over. 27 Cyc., 860. As said by Judge Hawley in *Leete* v. *Mining Co.,* 88 Fed., 957, one to whom money belongs may recover it by an action for money had and received, even though there be no privity of contract between the true owner and the recipient of the money "except that which results from one man having another's money which he has no right to keep. In such cases the law implies a promise that he will pay it over." Or, as said in *Law* v. *Ehrlaub,* 104 Ill. App., 263, 265, "an action for money had and received is maintainable whenever the money of one man has without consideration got into the pocket of another." While, as has been before remarked in this case, actions for money had and received are most commonly based upon cases where there has been a breach

of duty in a confidential relation, fraud, extortion, or some like wrong, nevertheless it is not essential that any such element should be present in order that a good cause of action should arise. Take the case of *Board of Commissioners* v. *Dredging Co.,* 251 Fed., 249, where a board of county commissioners had in entire good faith and simply from a mistaken view as to what the law permitted them, diverted to another purpose funds of a drainage district which ought properly to have been applied to payment of a warrant issued by the district. It was held that an action for money had and received would lie against the board of county commissioners to recover the amount of the warrant. So in *Heywood* v. *Assurance Co.* (Minn.), 158 N. W., 632, a case was presented of one person obtaining money which really belonged to another. There was no question of fraud or intentional wrong in the case. The case put by the court was simply this: Whether one person who had procured a payment to himself of money which he knows is due to another can retain it against such other. It was held he could not. In the same vein is *Smith* v. *Lumber Co.,* 81 Wash., 111, where there was doubt as to which of two claimants was entitled to a fund paid into court in a condemnation action. The lower court gave it to one claimant, but on appeal the other claimant was held entitled to it. It was held that an action for money had and received would lie by the one justly entitled to the fund against the other to whom it was awarded. To the contention that the action would not lie because there was no element of fraud

or duress in the case, but the claimant who received the money believed that it was honestly entitled thereto, it was said that "wrongs growing out of honest mistake can be redressed in a proceeding of this nature as well as wrongs growing out of fraud."

Now we repeat there is no hint in these instructions that Stanton could not legitimately make a profit in connection with the sale of the Hample and Hamilton stock, or that they would be entitled to recover from him any legitimate profit he might have made. The criticized instructions state clearly and concisely that it is only in the event that a part of the consideration for the sale of the Hample and Hamilton stock was paid to Stanton instead of to them that they are entitled to recover from him.

But even if the instructions would bear the construction which counsel seek to put on them, they were harmless under the issues and evidence in this case. Neither by pleadings, evidence, or requested instructions did Stanton make any claim to a commission for getting the Hample and Hamilton stock for Armour & Co. or admit in the slightest that he had made a profit out of the sale of their stock. On the contrary, he most vigorously denied having made any such profit and asserted emphatically that he was paid but $200 a share for his stock, the same that Hample and Hamilton were paid for theirs, and that the remainder of the consideration was paid him for his personal undertakings. Between the two opposing contentions there was no half-way ground. Either the plaintiffs

were right and Stanton had got a part of the consideration for their stock which ought to have been paid to them, or Stanton was right and he had been paid for his stock the same amount that the plaintiffs were paid and whatever additional amount he received was paid to him for his personal undertakings, having nothing whatever to do with the sale price of his stock or of the stock of the plaintiffs. Suppose, as counsel suggest, that the jury might have understood the instructions to charge that Stanton could not make a profit out of the sale of his associates' stock. How could that injure Stanton when his whole case is founded on the contention that no such profit was made?

At any rate, there is no place in this case for thought of legitimate profits and legitimate commission on the sale of the Hample and Hamilton stock with respect to which the jury might have been misled. Stanton, as before remarked, denies that any profit or commission was made. He says he received the same price, $200 a share, for his stock that was paid Hample and Hamilton, and that the remaining $92,266.66 which was paid him was for personal undertakings on his part. From the very nature of his story, the jury was obliged to accept or reject it in toto. If accepted, there was an end to the plaintiff's case. If rejected, still there could be no room for thought of his making a legitimate profit under the circumstances appearing. Counsel's contention in support of this assignment is that if the relation of prin-

cipal and agent did not exist, Stanton owed no duty to Hample and Hamilton, and that if he did not resort to actual fraud and misrepresentation he was free to make any arrangement he could for a profit from the sale of their stock, his position being compared to that of a broker who is entitled to any commission he can get.

Remembering what the evidence discloses, the statement of such a proposition as controlling this case betrays a very shallow knowledge of the law and an utter incomprehension of the principles of good conscience which control it. The comparison of Stanton to a broker who is entitled to any commission he could get is peculiarly unfortunate. If Stanton had gone frankly to Hample and Hamilton and told them that he came from Armour & Co. with a commssion to buy their stock, thus putting himself at the outset at arm's length to them, the argument advanced might be weighed. Under the evidence, however, if Stanton is to be considered as a broker he must be regarded as a broker for Armour & Co., unknown to Hample and Hamilton, who made use of his influential position in the Stanton Company to get their stock for Armour & Co. under the guise of acting in their interest, and in order to enable them to make an advantageous sale. We have it from Stanton's own lips that Hample and Hamilton had nothing to do with the management of the business, and knew nothing about it except what he told them from time to time (100). The business had prospered and they had no

thought of selling their stock, evidently were much disinclined to sell. But Stanton had determined to sell. He wanted to take a rest, his son would not take up the business, and he thought the present was the best possible time for getting out (79). He gave an option for the sale of 5084⅓ shares, more than the combined number of shares owned by himself, Hample and Hamilton, for $220 a share. He told no shareholder of his desire to sell out nor of the option. The option at that price was sufficiently attractive to bring the representatives of Armour & Co. from Chicago. After they had been in Spokane for several days, Stanton went to Butte to see Hample and Hamilton. He did not tell them of the option; he did not tell them that a quoted price of $220 had brought the Armour people from Chicago to look into the purchase of the property; he did not tell them of his personal reasons for desiring to sell. On the contrary, he self-confessedly led them to believe that Armour & Co. had taken up the question of a purchase of its own initiative; told them that its reason for doing so was that it desired to have a plant in Spokane; that if it did not purchase the Stanton plant it would build one of its own, with disastrous results to the Stanton property because of the severe competition that would result; that the plant was in bad shape, requiring repairs that would cost at least $150,000; that there was a large quantity of frozen meat on hand; that live stock was going higher; that conditions were unsettled, etc., etc., the net result be-

ing that they ought to sell for $150 a share if Armour & Co. would not pay more (101-102). His own testimony, then, shows that he went to Hample and Hamilton in the guise of the head of and largest shareholder in the Stanton Company, representing that he was actuated in doing so by the natural solicitude one in that position would feel for the shareholders in his company, and urged them to sell their stock for a very low price, arguing earnestly that the bad business prospects of the company demanded it. He did not tell them of the $220 quoted price which had interested Armour & Co. in the purchase; he did not tell them of the personal reasons which animated his desire to sell. He urged them to sell their stock for $150 solely upon the ground that the company's business outlook was very bad, and, be it remarked, he does not in this case attempt to show that the conditions were as he painted them. When to these considerations it is added that Armour & Co. a short time after paid $220 for all the Stanton Company stock, and that there was evidence from which the jury could properly find that Armour & Co. had determined that it would pay that amount and Stanton knew it would before he went to Butte; that he went to Butte to induce Hample and Hamilton to sell as cheaply as possible in order to make a profit on the difference between the $220 Armour & Co. would pay for their stock and the price he could induce them to sell for; and that because their stock was secured for $200 Armour & Co. paid Stanton $20 a share on

their stock, and a case was made—at least for the jury's consideration—of fraudulent concealment and misrepresentation which would authorize relief had they been the veriest strangers to each other, and the right to which cannot reasonably be questioned when their actual relation is considered.

The largest shareholder in and head of a corporation had been engaged in negotiations for a sale of land owned by it at a price which would greatly enhance the value of its stock. When the success of the negotiations seemed probable he purchased shares in the corporation through an agent, not disclosing his own interest or the pendency of the negotiations. There was no actual misrepresentation; nothing but concealment of the pending negotiations and of the identity of the purchaser. It was held that because the management of the corporation was virtually in his hands; that because of his "overwhelming influence" in the pending negotiations which it was evident he could defeat or bring to a successful conclusion as he chose; and that because no one knew so well as he "the probability of the sale of the lands" and "no one knew as well as he the probable price that might be obtained on such sale," he stood in a fiduciary relation to the shareholder and the sale would be avoided because he did not make full disclosure of all facts which might affect the value of the stock. *Strong* v. *Repide,* 213 U. S., 419.

We pause to remark that no one knew so well as Stanton the value of the Stanton Company stock and

all things which would affect its value. Hample and Hamilton knew practically nothing of those things except what Stanton told them. No one but Stanton knew the quoted price which had interested Armour & Co. in the purchase, and which (the jury might well find) it had told Stanton it would pay for the stock. No one but Stanton knew the personal reasons which made him desirous to sell. None of these things did Stanton disclose, but on the contrary urged Hample and Hamilton to sell their stock at a price far below what he must have known Armour & Co. would pay, upon grounds none of which is shown to be true, and most of which were plainly false. When to this is added evidence from which the jury would be warranted in finding that Stanton made a profit of $20 a share on the Hample and Hamilton stock by getting it for that much less than Armour & Co. was willing to pay for it, an invulnerable case is made against him of the receipt of money he ought not in good conscience to be permitted to retain.

In *Oliver* v. *Oliver* (Ga.), 45 S. E., 232, the case made was that a profitable sale of corporate property was in contemplation. Knowing this the president of the corporation secured an option on certain of the stock, and then purchased it when the sale was finally agreed on, thus making a large profit. No actual misrepresentation was charged; nothing but the withholding of information of the contemplated sale from the shareholder. In a masterly opinion holding that the shareholder could recover from the president the

profit he made, Mr. Justice Lamar (afterwards of the Supreme Court) pointed out how truly the corporate officer is in such a transaction a trustee for the shareholder, and how strong is the obligation resting upon the officer to disclose any information he may have which would affect the value of the stock. Among other things it was said:

> "Where the director obtains the information giving added value to the stock by virtue of his official position, he holds the information in trust for the benefit of those who placed him where this knowledge was obtained, in the well-founded expectation that the same should be used first for the company, and ultimately for those who were the real owners of the company. The director cannot deal on this information to the prejudice of the artificial being which is called the corporation, nor, on any sound principle, can he be permitted to act differently towards those who are not artificially but actually interested."

An analagous case is *Stewart* v. *Harris* (Kan.), 77 Pac., 277, it being charged that the president of a bank bought some of its shares for less than their actual value through not informing the shareholder of the prosperous condition of the bank. It was objected to a recovery that the shareholder could have known all about the bank's affairs; that its books were open to him and he could have advised himself fully concerning all matters which affected the value of the stock. Holding that was no reason for denying relief, it was said:

> "The diligence required by one to protect his interests is only such as a person of ordinary

> prudence would exercise under like circumstances. In a case like the one under review, the trust relation existing between the parties, the superior opportunities of defendant to know of the condition of the affairs of the bank, and his actual knowledge of its affairs, required no such diligence of inquiry on the part of plaintiff as is contended for by defendant. Plaintiff had the right to rely upon the belief that defendant would disclose to him the true condition of the affairs of the bank, and that he would not be called upon to investigate the condition of its affairs before he could with safety sell to defendant his holdings of stock. It is not the intent of the law to place a restraint on the affairs of business, when conducted fairly, honestly, and openly, nor to deprive one party to a contract of the advantage which superior judgment, greater skill, or better information may give; but it cannot give its approval to a course of dealing that will permit those occupying a trust relation to be unmindful of the trust, betray the confidence reposed, and profit by such betrayal."

Many other cases of similar effect might be referred to (they are cited, *supra*), but the reference is unnecessary. It is manifest that Stanton dealt unfairly with his associates, or at any rate it was a question for the jury if he did not, and therefore ought not to be permitted to retain the profit he made from them.

Counsel say that the issue presented by the criticized instructions was not within the issues made by the complaint and that this was recognized by the lower court, apparently referring to the fact that the court had given an instruction relative to the plaintiffs'

right of recovery if the jury found that Stanton was their agent. If the Court will but turn to the complaint it will observe that every fact covered by the instructions is covered by the complaint. The complaint sets out the relations of Stanton to the Stanton Company and to the plaintiff. It charges that he procured plaintiff to permit him (Stanton) to sell the plaintiffs' stock; that by deceit he got $20 a share on the price of plaintiff's stock and that this money is still retained by him without right. It covers, in other words, a case of agency, a case of fraud, a case of confidential relations, and the straightout case, unembarrassed by any other consideration, of one man getting and retaining another man's money without right thereto. If the plaintiff failed to prove everything alleged in his complaint, that would be no ground for denying him relief if he had still proved enough to bring his action within the principles governing actions for money had and received.

The second attack upon the instructions under consideration is prefaced by the assertion that counsel "have already shown" that the case was submitted to the jury on two inconsistent theories; tort and assumpsit. We find the same assertion of inconsistent submission made elsewhere in the brief, but nowhere demonstration of it; counsel contenting themselves with naked assertion.

We gather from counsel's argument, however, that their contention is that when the case was submitted to the jury on the theory that plaintiff was entitled to

recover if it found that defendant, while acting as plaintiff's agent, got $20 a share on his stock by fraud and deceit, it was submitted on the theory of tort, and when the jury was told that plaintiff could not recover if it found there was no agency unless it found a part of the consideration for plaintiff's stock was paid to defendant, the case was submitted on the theory that it was assumpsit. The notion is preposterous. Plaintiff, as required under the state practice, pleaded all the facts upon which he relied to recover. He pleaded not only agency, but the confidential relation in which defendant, as president and general manager of the Stanton Company, stood to him. He did not seek to set aside the sale or to recover damages for the wrong done him, but having alleged that by defendant's deceit he had obtained $20 a share on plaintiff's stock which in equity and good conscience belonged to plaintiff, he prayed recovery of that sum. Obviously here was a waiver of any other remedy, such as rescission, or to recover damages measured by the difference between actual value and the price paid, which the plaintiff might have had. An action cannot be *ex contractu* for one purpose and *ex delicto* for another, and where it is based on the waiver of a tort and the affirmance of a transaction, the waiver is for all the purposes of the case. *National Bank of Commerce* v. *Equitable Trust Co.*, 227 Fed., 526. It is not true, as counsel appear to suppose, that a plaintiff sues in tort when he alleges that by fraud, or by breach of a fiduciary obligation, the defendant ob-

tained his money. It is not true that to tell the jury that if it finds that the defendant by fraud or breach of duty obtained the plaintiff's money the plaintiff is entitled to recover, is to submit the case as one sounding in tort. Cases for money had and received spring more frequently from transactions where fraud, actual or constructive, imposition, extortion or duress are involved, than from any other. Cases cited, supra, 27 Cyc., 866, 2 R. C. L., 782. Of course under the reformed practice a plaintiff must state the facts upon which he relies for recovery, and cannot designate the action as one *ex contractu, ex delicto,* or in equity. Where, however, he sets out a fraud perpetrated upon him by which another has got his money, and does not seek to rescind or recover damages for the fraud but only to get the money that is his but was wrongfully diverted into the defendant's pocket, he is necessarily suing for money had and received and waives all other remedies. *National Bank of Commerce* v. *Equitable Trust Co.,* supra, 27 Cyc., 849. 2 R. C. L., 759. The complaint is drawn on the theory that the action is one for money had and received, for it charges that by the fraudulent transaction complained of the defendant obtained $20 a share on the plaintiff's stock, and this sum it seeks to recover. The instruction which it is said submitted the cause as one *ex delicto* does not depart from the theory of the complaint. Two of the essentials to plaintiff's recovery are there stated to be that it must be proved that Armour & Co. had agreed to pay $220

and not $200 a share for plaintiff's stock, and that it actually paid $220 therefor, $20 of which was wrongfully diverted to defendant (130). There is implied in the instruction what was plainly stated before, namely, that if the jury found for the plaintiff the recovery should be the $20 a share so obtained (129).

There are other portions of counsel's somewhat confused argument upon this point which seem to recognize that an action for money had and received may be based upon a tort, provided only the plaintiff waives his right to recover damages and seeks to recover nothing but his money which has actually gone into the defendant's pocket. We cainot understand how counsel could think that the plaintiff had taken any other position and counsel's argument does not inform us upon that point. Counsel talk about the "measure of damages" in an action for money had and received being different from the measure of damages where a tort is counted on. In truth there is no such thing as damages in an action for money had and received. The action is upon a contract, no less a contract because it is implied instead of expressed. It is not to recover any damage which the plaintiff has sustained through a wrong done him. It is to recover his property, his money which ought to be in his pocket but through the wrong of the defendant has gotten into the defendant's pocket. If, therefore, a plaintiff sues to recover his money which the defendant has received, and nowhere claims or attempts to prove damage done him by the wrong, he neces-

sarily waives the tort and sues on the implied contract. Looking to the complaint, the evidence, and the instructions, it will be observed that nowhere did plaintiff claim or attempt to prove damages, but throughout sought to recover merely the $20 a share which he asserts belongs to him, but which through the defendant's wrong has gone into the defendant's pocket. It is idle to attempt to make any submission of the case to the jury on the theory of recovering damages. The very first instruction given by the court stated that the plaintiff's claim was that the defendant had through wrong gotten $20 a share on the number of shares of stock owned by plaintiff, and that this $20 a share rightfully belonged to the plaintiff, and the jury was told that if it found such to be the case its verdict should be for the plaintiff in the amount of $20 a share, together with interest thereon from the time the defendant received it (128-129). The same thing is true of the next instruction given, the one upon which counsel apparently base their claim that the action was submitted as one in tort. While the court did not repeat its explicit declaration contained in the preceding instruction that the measure of recovery should be $20 a share, that is plainly implied (130-131). The same thought is contained, of course, in the criticized instruction now under discussion, for the jury was told that if the defendant received a part of the consideration for the sale of the plaintiff's stock the plaintiff was entitled to recover that amount.

It may be remarked in passing that the instruction which counsel contend submitted the case to the jury on the theory that it was one sounding in tort was an instruction requested by the defendant's counsel (120-121). That being so they cannot well complain of it.

The third objection to the criticized instructions is that they omit to say that plaintiff could only recover if the defendant had received plaintiff's money wrongfully and could not in equity and good conscience retain it.

It may be remarked that that element was necessarily included in these instructions. If a part of the consideration for the sale of the plaintiff's stock was paid to defendant without his giving anything of value therefor, plainly he could not in equity and good conscience retain it against the claim of the rightful owner. However, in giving an instruction it is not necessary that each isolated portion of it should state all the elements which are required to be submitted to the jury in the submission of the case. Reading the instructions as a whole it is patent that the jury could not have misunderstood that the plaintiffs were only entitled to recover if the defendant had wrongfully received their money and had no right to retain it. The very issues made between the two contending parties showed the jury must have so understood. The plaintiffs on the one hand contended that the defendant had, without consideration, through fraud, and in breach of the duty of a confidential relation,

obtained $20 a share on the number of shares owned by them of their money. The defendant, on the other hand, denied the plaintiff's contention in toto. He asserted that he had been paid precisely the same price for his stock that they were paid for theirs, and that the added consideration which he received was paid him for his personal undertakings. There was no middle ground for the jury to choose. If it found the defendant's story to be true it must necessarily have returned a verdict in his favor, for in such case he had none of the plaintiff's money. If, on the other hand, it found his story false, it necessarily accepted the plaintiff's theory, either in toto or sufficiently to establish that the defendant had, without right, and without consideration, gotten the plaintiff's money. We say, without right and without consideration, because the defendant asserted nothing except that he had never gotten a cent of their money, and if the jury found that he had got it is must necessarily find that he had gotten it without right and without consideration.

It should be remarked, moreover, that if the defendant's counsel thought the instruction not complete because it failed to say anything about equity and good conscience, they should have requested an instruction embodying that feature. It is like the case decided by this Court, where it was urged as error that an instruction defining adverse possession was not sufficiently full. The Court said that to assign error on omissions a request to make more full

is necessary. *Eastern Oregon L. Co.* v. *Cole,* 92 Fed., 949. As the Supreme Court has said, if a plaintiff in error desired "addition, amplification or qualification" it was necessary that he request it. *Ill. Cent. Ry.* v. *Skaggs,* 240 U. S., 66.

The fourth objection to the instructions is that there was undue repetition of the same proposition of law. Counsel overlook that this repetition was due in every case to the repetition of instructions which were favorable to defendant's contention, the criticized instruction each time it was given being an addendum to an instruction favorable to defendant. Thus the court charged the jury that if it found against the fact of agency, plaintiff could not recover unless it found that the defendant had in fact received the plaintiff's money. Obviously it would have been error for the trial court to have made the fact of agency the essential fact in the case and told the jury that plaintiff could not recover if it found no agency. The next time the instruction appears the trial court had given an instruction requested by the defendant as to what the plaintiff must prove in order to recover, and this instruction embodied the element of agency. To that the court added the criticised instruction that although the jury might find against the fact of agency, still the plaintiff could recover if it found that defendant had the plaintiff's money. Next the court gave another instruction requested by the defendant, which was that the defendant contended that he did not sell the plaintiff's stock, but that the plain-

tiff sold his own stock and fixed the price therefor, and the jury was told that if it found that to be the fact, then plaintiff could not recover. Again the court qualified the instruction with the statement that although it found the defendant did not sell the plaintiff's stock, yet if he had received a part of the consideration paid for the stock then plaintiff was entitled to recover. This repetition of the instruction which counsel criticize as undue is therefore seen to have been necessitated by the repetition of instructions requested by the defendant and favorable to his contention.

III.

Under the sixth specification of error it is assigned that judgment should not have been entered for the plaintiff because there was no evidence to sustain it. As we have heretofore pointed out, there was no challenge of the sufficiency of the evidence at any stage of the proceedings, but, on the contrary, the defendant requested instructions both with respect to the burden of proof resting upon the plaintiff and to the contentions made by the defendant which necessarily assumed that there was sufficient evidence for the jury to consider which of the opposing contentions was sustained by the evidence. We have heretofore cited controlling cases holding that under such conditions an appellate court would not consider an assignment that there was no evidence to sustain a recovery. In

addition to those decisions the Supreme Court has said:

> "If the finding of the jury was against the weight of the evidence, the remedy was by a motion for a new trial, which does not appear to have been made; and this court cannot exercise a function which was that of the jury."
>
> *Hedden v. Iselin,* 142 U. S., 676, 680.

No motion for a new trial appears in the record.

As heretofore remarked, just before the closing of the sale of the stock of Stanton, Hample and Hamilton to Armour & Co., the old board of directors of the Stanton Company, composed of Stanton, his son, and Hample and Hamilton, passed a resolution cancelling and discharging a $25,000 note which Stanton owed to the Stanton Company and giving him a Packard automobile owned by that company. There was conflicting evidence respecting the occasion for this action. The jury might well consider the transaction in determining upon the whole record where the truth lay; whether with the plaintiff or the defendant. As this Court is not concerned with that question, a discussion of the particular transaction cannot be of interest. This much, however, may be remarked. Stanton went to Butte to urge Hample and Hamilton to sell their stock to Armour & Co. for $150. He pressed upon them that so gloomy was the business future for the Stanton Company that he would gladly take that price for his stock if he could not get more. Accord-

ing to his own story he emerged from the deal three or four days later with $200 a share for his stock, over $120,000 more than he would have been glad to sell for, $92,266.66 for sundry collateral undertakings to only one of which, the guaranty of the accounts, could he have attached any substantial value, a discharged debt of $25,000, and a Packard automobile. Estimating the automobile to be worth $4,000, Stanton's gain in three or four days on what he considered his property to be really worth was $241,266.66. Yes, the jury may well have considered the $25,000 debt and the automobile in determining whether Stanton told the truth.

Oh, yes, there must not be overlooked either the agreement of Armour & Co. to pay him $220 for any of the stock he could get, regardless of the price he paid, which he says was put in as sweetening, in order to overcome his reluctance to accept the hard bargain offered him!

HAMILTON'S CASE.

There was involved in Hamilton's case an attempted rescission by him of the contract which he made in Spokane for the sale of his stock to Armour & Co. In that respect only does it differ from Hample's case.

It appears that Hample's contract provided that his stock should be deposited in the First National Bank of Butte, and that Armour & Co. should pay for it there within a stated time. Hamilton's contract was substantially similar except that it provided that his

stock should be deposited and paid for at the bank of W. A. Clark & Brother in Butte. Through mistake Armour & Co. sent settlement for both lots of stock to the First National Bank. Hamilton waited until some time after the stated period within which settlement was to have been made for his stock, then acting on the advice of some one in the bank who told him that he had the right to do so, he withdrew his stock and notified Armour & Co. that he considered himself released. Armour & Co. wired Mr. Kizer, then Stanton's attorney in Spokane, what had occurred, and Kizer posted off to Butte to fix up matters. Kizer evidently bluffed liberally, threatening Hamilton with suits to compel him to perform and advising him that he had better consult a lawyer before refusing to perform. Hamilton finally acted on this advice, and the lawyer whom he consulted advised him that he could be compelled to perform. In the meantime Hamilton had purchased 773 shares of the Stanton Company stock from one Overholt. After a time O'Hern, one of the Armour representatives in charge of the Spokane negotiations, arrived in Butte. Hamilton then delivered his stock, being paid for at the price and upon the terms stipulated in the Spokane contract; indeed, the very check and notes which had been mistakenly sent to the First National Bank were used in closing the transaction. A day or so later Hamilton sold the Overholt stock to Armour & Co. for $220 a share.

There was a good deal of conflict in the evidence

relating to this transaction, and it may be conceded that the jury might about as well have taken one view of it as the other. We have sketched it thus briefly because it is evident that it was for the jury to say whether the evidence sustained the view Stanton urges or the one that Hamilton maintains. It suffices that it was claimed for Stanton that Armour & Co. finally acquiesced in Hamilton's repudiation of the Spokane contract and a new agreement was reached; Armour & Co. agreeing to buy the Overholt stock for $220 and Hamilton agreeing that in consideration of the sale of the Overholt stock at that price he would sell his stock at $200, the price fixed in the Spokane contract. On the other hand, Hamilton claimed that, albeit reluctantly, he did not persevere in his attempted repudiation of the Spokane contract because of Mr. Kizer's threats to bring suit to enforce the contract and the advice of Mr. Sanders (Hamilton's attorney) that he had no chance to beat it. (Hamilton record, 68. Hample record 66). The sale of the Overholt stock, he claimed, was an entirely independent transaction, having nothing to do with his final decision to deliver his stock under the Spokane contract, that being done because he believed he was obliged to (Hamilton record, 71-72. Hample record, 69-70). Recognizing that it was for the jury to say whether the evidence sustained Hamilton's view or Stanton's view of the transaction under discussion, Stanton's counsel requested an instruction that if Hamilton repudiated the contract for the sale of his stock, claim-

ing that he had been induced to enter into it through misrepresentation or fraud, and that later Armour & Co. entered into another contract with him for the purchase of his stock and other stock in the same company, for which Armour & Co. paid him, that in such event he could not recover. The requested instruction was given with some very slight changes, and it is of these changes that counsel (ostensibly) complain.

The small changes made in the requested instruction did not affect its substance in the least. The thought expressed in the requested instruction was that if Hamilton repudiated the Spokane contract for the purchase of his stock, and subsequently Armour & Co., acquiescing in his repudiation of that contract and thus putting an end to it, entered into another contract for the purchase of his stock and other stock in the same company (the Overholt stock), and paid him therefor, he could not recover. The test of his right to recover, in other words, was whether he actually sold his stock under the Spokane contract or under a later contract, covering a different subject matter in important respects, which Armour & Co. made with him. If he abandoned his attempt to withdraw from the Spokane contract, and, yielding to the insistence of Armour & Co. that he perform it, delivered and was paid for his stock thereunder, then he could recover, for it was by means of that contract that Stanton got his money. On the other hand, if he persisted in the rescission of the Spokane contract,

and Armour & Co., yielding, made a new contract with him which also covered the Overholt stock, then he could base no claim through the Spokane contract thus put to an end, and could not recover.

Now, wherein does the instruction given depart from the instruction requested? In this only. The requested instruction read that if after repudiation of the Spokane contract the plaintiff "entered into another contract with Armour & Co. whereby he sold the stock," etc., he could not recover. The instruction given followed this language literally except in the use of the words "another contract." It read that if after repudiation of the Spokane contract the plaintiff "entered into a new and independent contract with Armour & Co. for a new consideration whereby he sold the stock," etc., he could not recover. Of course calling the contract referred to a "new and independent contract" instead of following the language of the requested instruction literally and speaking of it as "another contract" did not change the meaning. From Webster and the Century we have it that "another" means: "One more, in addition to a former number; * * * Not the same; different; a second, a further, an additional; one more; of a different kind, nature, or character * * * used by way of contrast." And so far as the introduction of the words " a new consideration" is concerned, it is quite generally understood that when a person speaks of a contract he means a valid, enforcible one, therefore necessarily based upon

a sufficient consideration. As to the addendum to the requested instruction, namely, that if on the other hand the jury found that the stock was finally delivered under the Spokane contract and not pursuant to some new and independent contract, then Hamllton's attempt to rescind would not bar his recovery, that was merely expressing an alternative which was necessarily implied in the requested instruction. In other words, when Stanton's counsel requested an instruction that Hamilton could not recover if he sold under another later contract and not under the Spokane contract, the alternative was necessarily implied that if he sold under the Spokane contract and not under another later contract he could recover. It was this alternative which in the addendum the trial court put in words instead of leaving it to be implied.

It is plain, therefore, that counsel are merely complaining that the trial court spoke of a "new and independent contract" instead of following the requested instruction literally and referring to "another contract." That is sheerest cavilling, quibbling, trifling; highly improper in this Court and unworthy of counsel of standing.

We feel the less hesitancy in characterizing the urging of this assignment of error as we have because counsel's argument convinces us that we have correctly characterized it. There can be no misunderstanding concerning the conflicting evidence to which the requested instruction was directed. It was

claimed for Stanton that because of Hamilton's persistent refusal to deliver his stock under the Spokane contract Armour & Co. made a new contract with him, agreeing to pay him $220 a share for the Overholt stock in consideration of his delivering his own stock at the price fixed in the Spokane contract. Hamilton's claim, on the other hand, was that Armour & Co. refused to yield and insisted that he should deliver his stock under the Spokane contract; that Kizer threatened him with a suit to enforce performance and his attorney told him he had no defense thereto, in consequence of which he finally acquiesced in the demands of Armour & Co. and delivered his stock under the Spokane contract; that the sale of the Overholt stock was an independent transaction, consummated several days later. Now, counsel do not suggest what distinction, that evidence considered, there can be drawn between referring to the alleged new contract made in Butte under which Stanton insisted Hamilton's stock was delivered as "another contract," as in the requested instruction, and referring to it as "a new and independent contract," as in the instruction given. Neither do they, assuming there is a distinction, point out how the change in verbiage could be injurious to Stanton. We confess that we cannot follow their argument, but so far as we can understand them the point they would make is that as matter of law Hamilton rescinded the Spokane contract when he withdrew his stock from the bank and noti-

fied Armour & Co. he would not perform; that such action was an irrevocable election not to be bound by the Spokane contract, and he would not be heard to say that he thereafter accepted its terms and delivered his stock under it; and that therefore it was error to submit to the jury the question of whether he delivered his stock under the Spokane contract or under a later one. That, of course, is not good law. There was no rescission of the contract although Hamilton attempted to rescind if Armour & Co. stood upon it and insisted that Hamilton perform, and Hamilton, yielding to the insistence of Armour & Co., did perform. Of course the election of one party to rescind, which is accepted by the other party, terminates a contract. If the right to rescind is disputed, however, the one seeking to rescind may abandon his attempt and acquiesce in and perform the contract, in which event there is no rescission and the contract stands as though rescission had never been attempted. 13 Corpus Juris, p. 626, §691, *McNaught* v. *Assurance Society,* 121 N. Y. Supp., 447. But that proposition of law is purely a moot question in this case. Stanton's trial counsel took a position which is diametrically opposed to that which his present counsel seek to take. If as matter of law Hamilton's mere attempt to rescind was a completed rescission, an election not to be bound by the contract which estopped him to say it was in force, although Armour & Co. refused to accept his election and compelled him to

perform, then a verdict should have been directed against him. Stanton's trial counsel not only did not move for a directed verdict or in any other way challenge the sufficiency of the evidence to sustain a recovery by Hamilton, but they requested an instruction submitting to the jury as a question of fact which of the opposed contentions was sustained by the evidence; whether Hamilton delivered his stock under the Spokane contract as he claimed, in which event he could recover, or whether he delivered it under another contract made later on, as contended by Stanton, in which event he could not recover. Stanton's present counsel know perfectly well that with that requested instruction staring them in the face they would not be heard to contend directly that no question of fact was involved, but a pure question of law, and that therefore it was error to submit the question of which contract Hamilton delivered his stock under to the jury. Because they know it they invented the pretext that the trial court erred in substituting in the instruction given the words "a new and independent contract" for the words "another contract" in the instruction requested, then, making no pretense of suggesting wherein the substitution was either harmful or technical error, they proceed to argue that no instruction of that sort should have been given because as matter of law the Spokane contract was put an end to by Hamilton's attempt to rescind. If that be not sheer quibbling, mere trifling without shadow

of excuse, we do not know the meaning of those terms.

Respectfully submitted,

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